

United States
Circuit Court of Appeals

For the Ninth Circuit.

BISHOP TRUST COMPANY, LIMITED and
MR. ARTHUR BERG, Trustees, MAUDE G.
YOUNG TRUST,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review an Order of the United States
Board of Tax Appeals.

FILED

FEB 24 1937

PAUL P. O'BRIEN,

United States
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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APPEARANCES

For Taxpayer:

E. R. CAMERON, Esq.,
FRANK F. NESBIT, Esq.,

For Comm'r.:

JAMES H. YEATMAN, Esq.,

Docket No. 79845

BISHOP TRUST COMPANY, Limited and
MR. ARTHUR BERG, Trustees, MAUDE
G. YOUNG TRUST,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1935

- May 27—Petition received and filed. Taxpayer notified. (Fee paid)
- “ 28—Copy of petition served on General Counsel.
- Jul. 26—Answer filed by General Counsel.
- “ 30—Copy of answer served on taxpayer.
- Dec. 30—Joint motion to remove from the circuit calendar and to place on the day calendar at Washington, D. C. at which time stipulation of facts will be offered with leave to file written briefs filed. 1/3/36 granted.

1936

- Jan. 3—Hearing set Jan. 13, 1936.
- “ 13—Hearing had before Mr. Arnold, Div. 12. Stipulation of facts filed. Briefs as per rules.
- “ 18—Transcript of hearing Jan. 13, 1936 filed.
- Feb. 24—Brief filed by taxpayer. 2/24/36 copy served.
- Mar. 28—Reply brief filed by General Counsel.
- May 6—Order that petitioners reply brief be received and filed entered.
- “ 6—Reply brief filed by taxpayer.
- “ 6—Copy of order and reply brief served on General Counsel.
- Aug. 11—Memorandum opinion rendered, Mr. Wm. W. Arnold, Div. 12. Decision will be entered for the respondent.
- “ 11—Decision entered, Div. 12.
- “ 13—Order amending caption in memorandum opinion and decision entered.
- Nov. 9—Supersedeas bond in the amount of \$1,425.02 approved and ordered filed.
- “ 9—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.
- “ 9—Proof of service filed.
- Dec. 23—Agreed praecipe filed with proof of service thereon.
- “ 23—Notice of the appearance of Frank F. Nesbit as counsel for taxpayer filed. Service of copy thereon.

1936

Dec. 28—Order enlarging time for transmission and delivery of the record to January 30, 1937 entered. [1*]

United States Board of Tax Appeals

Docket No. 79845

BISHOP TRUST COMPANY, Limited, and
MR. ARTHUR BERG, Trustees, MAUDE
G. YOUNG TRUST,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:AR:E-1,NF-90D) dated March 11, 1935, and as a basis of their proceeding allege as follows:

I

The petitioners are the duly appointed and authorized trustees of the Maude G. Young Trust, with their principal office in the offices of the Bishop Trust Company, Limited, King and Bishop Streets, Honolulu, Territory of Hawaii. [2]

Following the death of Mr. Arthur Berg, Trustee, the surviving trustee duly appointed Nelson Gillet

*Page numbering appearing at the foot of page of original certified Transcript of Record.

Young as successor co-trustee, on November 22, 1934. Said appointment was approved and confirmed by the Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers in Equity, on the date of aforesaid.

II

The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners on March 11, 1935.

III

The tax in controversy is income tax for the calendar year 1932, and amounts to Seven Hundred Twenty-four Dollars and fifty-one cents (\$724.51), as follows:

Alleged deficiency in tax,	\$721.51
Tax overassessed and overpaid, as claimed by the petitioners,	12.00
Tax in controversy,	<u>\$724.51</u>

IV

The determination of tax set forth in the aforesaid notice of deficiency is based upon the following error;

In determining the income tax liability of the petitioners for the calendar year 1932, the Commissioner of Internal Revenue, in computing the net income of the trust estate, as provided in Section 162 of the Revenue Act of 1932, denied as additional deductions from gross income, as provided in paragraph (b) of said section, the amounts

of income of the Trust for its taxable year 1932 which were distributed currently by [3] the Trustees to the income beneficiaries during said year, viz.: \$6,000.00 to each of Alice Pauline Young MacRae and Nelson Gillet Young, in accordance with the provisions of the Will of Maude Gillet Young, deceased.

V

The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) Maude Gillet Young, widow, died testate on October 3, 1926, a resident of the Territory of Hawaii.

(b) On September 24, 1926, she had executed her last will and testament. After her death, said will was duly probated and administered under the laws of the Territory of Hawaii.

(c) After providing for the payment of (1) her just debts, funeral and administration expenses, (2) of estate and inheritance taxes on all devises and bequests, and (3) of the cash legacies, out of the cash principal of her estate at the time of her death and the proceeds of sales of her bonds and real estate and the surplus net income over the amounts payable to her daughter and son, without selling any of her corporate stocks, Maude Gillet Young gave, devised and bequeathed all of the rest, residue and remainder of her property, both real and personal, to named Trustees and their successors in trust. The Executors were authorized to complete the administration of the estate and to transfer and deliver the residue thereof to the

Trustees charged with the payment of the cash legacies, if the payment of said legacies could not be made within a reasonable time out of the cash derived from the sources aforesaid. The Trustees were authorized to accept said residue so charged with said cash legacies and to pay said legacies out of the surplus net income of the trust estate.

(d) The Trustees were directed to pay to Alice Pauline Young MacRae, the decedent's daughter, out of the income of said trust estate, Five Hundred Dollars (\$500.00) monthly until she and her brother, Nelson Gillet Young, both shall have attained the age of 35 years or died, and said Trustees were directed to pay to Nelson Gillet Young, the decedent's son, out of the income of said trust estate, Two Hundred Fifty Dollars (\$250.00) monthly until he shall have attained the age of 25 years or until his marriage or death, whichever event happened first, and thereafter to pay to him, if surviving, out of the income of said trust estate, Five Hundred Dollars (\$500.00) monthly until he and his sister both shall have attained the age of 35 years. Additional payments of income to Nelson Gillet Young and Alice Pauline Young MacRae were authorized to be made by the Trustees, in their discretion, whenever needed by said beneficiaries because of illness or any other special cause or purpose.

(e) After the daughter and son aforesaid both shall have attained the age of 35 years and shall be then surviving, the Trustees are directed to transfer, convey deliver in fee simple, free from

any trust, to each of them, one-half of all the principal and accumulated income of the trust estate. [5] Provision was made, also, for the disposition of the income of the trust estate and of the principal thereof, in the event that the daughter and/or the son should die prior to attaining the age of 35 years.

(f) By decree of the Circuit Court, First Judicial Circuit, Territory of Hawaii, dated December 20, 1926, the Bishop Trust Company, Limited, and Arthur Berg were appointed Trustees under the Will and of the Estate of Maude Gillet Young, deceased. The said Trustees on May 11, 1928, filed with the Executors under said will and estate, their receipt for the residuary estate of Maude Gillet Young, deceased, charged with all of the cash legacies provided in the decedent's will.

(g) During the calendar year 1932, the statutory income and deductions of the Trustees were, prior to the application of the provisions of Section 162 (b) of the Revenue Act of 1932, as follows:

Gross Income

Interest,		\$	784.80
Rent,			1,631.42
Dividends (domestic),			25,263.02
			<hr/>
			27,679.24
Taxes,	\$1,443.76		
Other deductions,	1,885.29		3,329.05
			<hr/>
Net income, prior to the application of Section 162 (b),			\$24,350.19

(h) Twelve monthly cash payments, each of \$500.00, of the income of the Maude Gillet Young Trust for the calendar year 1932 were actually made to each the daughter and son of Maude Gillet Young, deceased, during said calendar year, in accordance with the provisions of her will, in totals as follows: [6]

Alice Pauline Young MacRae,	\$ 6,000.00
Nelson Gillet Young,	6,000.00
	<hr/>
Total,	\$12,000.00

(i) Under the provisions of the will of Maude Gillet Young, the monthly payments to the daughter and son aforesaid were payable only from income.

(j) In determining their taxable net income for the calendar year 1932, the Trustees were authorized to deduct, under the provisions of Section 162 (b), Revenue Act of 1932, and they deducted, the \$12,000.00 income paid to Alice Pauline Young MacRae and to Nelson Gillet Young, as aforesaid.

(k) Nelson Gillet Young, in determining his gross and net incomes for the calendar year 1932, included, as a dividend, in accordance with instructions received from the Trustees of the Maude Gillet Young Trust, the \$6,000.00 income paid to him by, and received by him from, said Trustees during the year aforesaid.

(1) Alice Pauline Young MacRae, who, at the time her federal income tax return for 1932 was due to be filed, resided at 192 Norfolk Street, Wollaston, Massachusetts, was instructed, by the Trus-

tees of the Maude Gillet Young Trust, to include in her gross and net incomes from the calendar year 1932, the \$6,000.00 income paid to her by, and received by her from, said Trustees during said calendar year, and the petitioners believe that said beneficiary prepared and filed her federal income tax return for 1932 as so instructed.

(m) The first accounting period of the Trustees commenced October 1, 1926, and terminated November 1, 1928. Each [7] succeeding accounting period began November 1 and ended October 31. Said accounts have been kept at all times upon the cash receipts and disbursements basis.

(n) The federal income tax returns of the petitioners, beginning with their income tax returns for the taxable year 1928, and including their returns for the calendar year 1932, have been prepared and filed upon the cash and calendar year bases.

(o) When computing the taxable net income of the Trust for each of its taxable years 1928 to 1932, the Trustees of the Maude Gillet Young Trust deducted from their gross income for each of said taxable years, as authorized by Section 219 (b)(2) of the Revenue Act of 1926 or by Section 162 (b) of the Revenue Act of 1928, whichever was applicable, the distributions made out of income during each of said taxable periods to the income beneficiaries aforesaid, in conformity with the terms of the will creating said trust.

(p) The net income of the Trust for each of the taxable years 1928 to 1932, prior to the application of the provisions of Section 219 (b)(2) of the 1926 Act or of Section 162 (b) of the 1928 Act, was more than adequate to make the distributions to the income beneficiaries authorized and directed by the will creating the trust.

(q) Each of the two income beneficiaries of the Trust, namely, Alice Pauline Young MacRae and Nelson Gillet Young, was instructed by the Trustees of the Maude Gillet Young Trust to include in her or his gross and net income for each [8] of the taxable years 1928 to 1932, the income distributed to and received by each of them during each of said taxable years. The petitioners believe that each of said income beneficiaries included in gross income in her or his federal income tax return for each of the taxable years aforesaid, the income distributed to and received by each of them from said Trustees as aforesaid.

(r) The Commissioner of Internal Revenue, upon his examination of the federal income tax returns of the Trustees aforesaid for the taxable years 1928 to 1932, approved as additional deductions from their gross incomes, in the determination of their statutory net incomes for said years, the distributions of income made to the income beneficiaries aforesaid, and upon his examination of the income tax returns filed by the income beneficiaries of said trust estate, the Commissioner approved the inclusion in their gross and net incomes, of the distributions of income made to them by the Trustees aforesaid.

WHEREFORE, the petitioners pray that this Board may hear the proceeding and determine (1) that the petitioners were authorized to deduct, under the provisions of Section 162 (b) of the Revenue Act of 1932, in the determination of their taxable net income for the calendar year 1932, the \$12,000.00 actually paid to the income beneficiaries of the Maude Gillet Young Trust; (2) that there is no additional income tax due from the Trustees for said taxable year, and (3) that, instead, said Trustees are entitled to a refund of \$12.00 income [9] tax overassessed and overpaid for the calendar year 1932.

E. R. CAMERON,

Counsel for Petitioner, 314-19
Bishop Trust Building, Hon-
olulu, T. H.

Of counsel:

BERNICE W. HATHAWAY,

314-19 Bishop Trust Building, Honolulu,
T. H.

Territory of Hawaii

County of Honolulu—ss.

On this 15th day of May, 1935, before me personally appeared Nelson G. Young, who, being by me duly sworn, says that he is a duly appointed co-trustee of the Maude Gillet Young Trust; and, on the same day, month and year aforesaid, before me personally appeared G. W. Sumner, who, being by me duly sworn, says that he is a vice president of

Bishop Trust Company, Limited, a Hawaiian corporation, and a duly appointed co-trustee of the trust estate aforesaid; that Nelson G. Young and Bishop Trust Company, Limited, are the petitioners in the above-entitled proceeding; that they are duly authorized to verify the foregoing petition, the contents of which they have read and with which they are familiar, and that the statements of fact contained therein are true to the best of their knowledge and belief.

(S) NELSON G. YOUNG
BISHOP TRUST COMPANY,
LIMITED,

By (S) G. W. SUMNER,

Vice President.

Co-trustees of the Maude
Gillet Young Trust. [10]

Subscribed and sworn to before me this 15th day
of May, A. D., 1935.

[Seal]

(S) JOHN LITTLE,

Notary Public, First Judicial Circuit, Terri-
tory of Hawaii. [11]

EXHIBIT A

Treasury Department
Washington

Office of
Commissioner of Internal Revenue

March 11, 1935.

Bishop Trust Company, Ltd., and
Mr. Arthur Berg, Trustees,
Maude G. Young Trust,
c/o Bishop Trust Company,
Honolulu, T. H.

Sirs:

You are advised that the determination of the income tax liability of the Maude G. Young Trust for the year 1932 discloses a deficiency of \$712.51 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C. for the attention of IT:C:P-7. The signing and filing of this form will expedite

the closing of the return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By (Sgd.) CHAS. T. RUSSELL,

Deputy Commissioner.

Enclosures:

Statement

Form 870 [12]

STATEMENT

IT:AR:E-1

NF-90D

In re: Bishop Trust Company, Ltd., and Mr. Arthur Berg, Trustees, Maude G. Young Trust, c/o Bishop Trust Company, Honolulu, T. H.

INCOME TAX LIABILITY

Year—1932

Income Tax Liability—\$815.02

Income Tax Assessed—\$102.51

Deficiency—\$712.51

The deficiency shown herein is based upon the report dated August 1, 1934, prepared by Internal Revenue Agent C. D. Bedrosian, and transmitted to you under date of August 9, 1934, which report is made a part of this letter.

Under date of January 9, 1935, form 56M, "Notice to the Commissioner of Internal Revenue of Fiduciary Relationship" was forwarded for execution and immediate return to this office. To date the document has not been received in this office.

Careful consideration has been accorded your protest dated August 22, 1934, and the report of the conference held in the office of the internal revenue agent in charge, relative to the denial as a deduction from gross income in the determination of the statutory net income of the Maude G. Young Trust for the calendar year 1932, of \$12,000.00 paid during the year to the beneficiaries, under the provisions of the will of Maude *Gillett* Young.

The revenue agent disallowed the deduction of the payments to the beneficiaries on the theory that the amounts received by the beneficiaries represent legacies, and, therefore, are not deductible by the fiduciary. It is your contention that the amounts in question are deductible from the income of the fiduciary under the provisions of the decision of the United States Supreme Court dated December 11, 1933, in the case of the Commissioner v. Julia Butterworth et al., which holds that if the payments to the annuitants can be reduced, due to the failure of the corpus to produce the necessary income, and are dependent in amount solely on the income of the trust, then such payments become a charge against income alone, and are deductible by the fiduciary. You contend that this decision applies in the instant case since the will provided that the cor-

poration stocks forming a part of the [13] estate could not be sold to make the payments, that this left only the other assets forming a part of the corpus, amounting to approximately \$92,000.00, which were charged with specific legacies of \$80,000.00, and that, therefore, inferentially there was no corpus to be charged with the payments to the two persons referred to above.

An examination of the will of Maude Gillett Young discloses that no statement was made therein as to whether the payments to the annuitants may be reduced if the income of the estate is insufficient to pay them.

The agent conferee has cited the decision of the United States Supreme Court, dated December 11, 1933, in the case of the Commissioner v. Frank Pardee et al., which holds that if the payments to the annuitants of a trust cannot be reduced due to the failure of the corpus to produce the necessary income to pay them, then the annuities become a charge against both corpus and income and are not deductible by the fiduciary. Your attention is also directed to the Supreme Court decision, dated April 13, 1931, in the case of the Commissioner v. Sibyl Whitehouse, cited in Cumulative Bulletin X-1, page 366, as Court Decision 327, in which case also the will directed payment of an annuity of \$5,000.00 without reference to the existence or absence of income. It was held that the bequest to Mrs. Whitehouse was not one to be paid from income, but of a sum certain, payable at all events during each year

so long as she should live, and as such was not taxable to the recipient as a "distributive share of the income of the estate or trust."

On the basis of the Pardee and Whitehouse rulings, it is held by this office that the payments directed under paragraph 9 of the will of Maude Gillett Young were to be made whether there was income of the estate or not, that such payments became a charge against income and corpus other than corporate stocks, and therefore constitute bequests which are taxable to the estate entity.

A copy of this letter has been mailed to your representative, Mr. E. R. Cameron, in accordance with the authority conferred upon him in the power of attorney executed by you and on file with the Bureau.

[Endorsed]: Filed May 27, 1935. [14]

[Title of Court and Cause.]

ANSWER

The respondent, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, for answer to the petition filed herein, admits and denies as follows:

- I. Admits the allegations in paragraph I.
- II. Admits the allegations in paragraph II.
- III. Admits that the tax in controversy is income tax for the calendar year 1932, and that the

amount of the deficiency determined by respondent is \$712.51.

IV. Denies that respondent's determination is based upon error as alleged in paragraph IV.

V. Denies the material allegations of fact contained in sub-paragraphs (a) to (r) inclusive, of paragraph V.

Denies generally and specifically each and every allegation contained in the petition not hereinabove admitted, qualified or denied.

WHEREFORE, it is prayed that respondent's determination be in all things approved.

(Signed) ROBERT H. JACKSON,

Assistant General Counsel for the
Bureau of Internal Revenue.

Of Counsel:

JAMES H. YEATMAN,

Special Attorney, Bureau of In-
ternal Revenue.

[Endorsed]: Filed July 26, 1935. [15]

[Title of Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, and may be received by the Board in evidence with the same force and effect as if the facts herein contained were testified to by competent witnesses:

(1) The petitioners are duly appointed and qualified Trustees of the Maude G. Young Trust, created under the Will of Maude Gillett Young, deceased, with their principal office in the offices of the Bishop Trust Company, Limited, King and Bishop Streets, Honolulu, T. H.

(2) Maude Gillett Young, widow, died testate on October 3, 1926, a resident of Honolulu, Territory of Hawaii, and was survived by two children, Alice Pauline Young MacRae and Nelson Gillett Young.

(3) The testatrix died seized of an estate both real and personal, the disposition of which she provided for in her last Will and Testament, executed on September 24, 1926.

(4) Exhibit "A" attached hereto is a photostat copy of the Will aforesaid, and is hereby made a part hereof to the same effect as if set forth herein in full. [16]

(5) The aforesaid Will was duly admitted to probate in the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

(6) Letters testamentary issued on November 15, 1926, to Bishop Trust Company, Limited, and Arthur Berg, aforesaid, as Executors, who duly entered upon their duties as such.

(7) The Executors and Trustees named in the Will aforesaid, being the same parties, assumed to function concurrently in the management and control of the estate and the trust.

(8) On December 20, 1926, said Executors petitioned to be, and in fact were, appointed Trustees

under the Will of the Maude G. Young Trust Estate.

(9) Said appointment, in part, was to facilitate the payment of the monthly sums to the daughter and to the son, as called for by the Will, from the date of death, inasmuch as the Will provided that such payments should be made by the Trustees as distinguished from the Executors.

(10) Subsequent to the death of Mr. Arthur Berg, on June 1, 1934, a co-Trustee as aforesaid, the surviving Trustee, pursuant to the provisions of Clause XI of said Will, appointed Nelson Gillett Young as successor co-Trustee.

(11) The aforesaid appointment was approved and confirmed by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers in Equity, under Vesting Order dated November 22, 1934.

(12) On February 17, 1928, the Executors petitioned for the allowance of their first and final accounts, determining trust and final distribution, covering a period from October 5, 1926, to January 19, 1928. [17]

(13) Said accounts were approved and Order of Discharge of the Executors made on April 16, 1928, whereby said Executors were ordered to deliver to the Trustees in final distribution the residuary estate subject to the payment of the cash legacies.

(14) Receipt therefor was filed on May 17, 1928, by the Trustees as residuary legatees and devisees,

and the Clerk's Certificate of Final Discharge issued on June 13, 1928.

(15) The Trustees recorded on their books, as follows, the residuary estate, amounting to \$620,-780.61, subject to unpaid cash legacies, as aforesaid, totaling \$80,000.00:

King and Victoria Streets property	\$75,000.00	
Pacific Heights Lot #9	4,382.64	
Leasehold Papaakoko	8,000.00	
von Hamm-Young Company, Limited	281,500.00	
Bishop Trust Company, Limited	3,925.00	
Alexander Young Estate	296,200.00	
McCabe, Hamilton & Renny	450.00	
Waiialua Agricultural Company	10,575.00	
Stamps, Miscellaneous Collection	5,000.00	
Cash, Bank of Bishop & Company, Ltd.	15,217.97	
Estate	\$10,042.87	
Maude G. Young Trust	5,175.10	
Kailua Land Trust	530.00	
Capital		\$620,780.61
Legacies:		80,000.00
Leahi Home	15,000.00	
The Protestant		
Episcopal Church	10,000.00	
Miss Charlotte Gillett	15,000.00	
Mrs. Alice Gillett Berg	15,000.00	
Miss Frances Gillett	15,000.00	
Charitable purposes	10,000.00	
		\$700,780.61
		\$700,780.61

(16) Pursuant to the terms of the Will of testatrix, the Trustees have made monthly payments of the sums specified therein to her children from the date of death, October 3, 1926, to the present time. [18]

(17) The books of account and records of the Trustees have been kept on the cash-receipts and disbursements basis at all times; and their Federal income tax returns have been filed on the same basis.

(18) The accounts of the Trustees have been kept upon the basis of a fiscal year ending on a day other than the last day of the month.

(19) During the calendar year 1932, the statutory income and deductions (not including whatever deduction may be allowable under the provisions of Section 162 (b) of the Revenue Act of 1932 on account of payments made to beneficiaries) of the Maude G. Young Trust were, of amount, as follows:

Gross Income

Interest	\$ 784.80	
Rent	1,631.42	
Dividends (domestic)	25,263.02	\$27,679.24

Deductions

Taxes	\$ 1,443.76	
Other deductions	1,885.29	3,329.05

Net income prior to the
application of Section
162 (b)

\$24,350.19

(20) Nelson Gillett Young was both twenty-one years of age and married prior to the beginning of the calendar year 1932; but neither Nelson Gillett Young nor Alice Pauline Young MacRae had at-

tained the age of thirty-five years on or before December 31, 1931.

(21) In accordance with the Will of the testatrix, the Trustees made distributions to the aforesaid cestuis que trust during the calendar year 1932 as follows:

Alice Pauline Young MacRae	\$6,000.00*
Nelson Gillett Young	6,000.00*
*12 monthly payments of \$500.00 each. [19]	

(22) The Trustees, in their return of annual net income, on Form 1041, for said calendar year, which return was filed with the Collector of Internal Revenue for the District of Hawaii, at Honolulu, Hawaii, claimed an additional deduction, under the provisions of Section 162 (b) of the Revenue Act of 1932, of the \$12,000.00 distributed to the cestuis as aforesaid, and voluntarily paid to the Collector of Internal Revenue at Honolulu \$102.51 income tax on the undistributed net income of the Trust.

(23) The Commissioner of Internal Revenue examined the income tax return of the Maude G. Young Trust for the calendar year 1932, and a notice of deficiency, a copy of which is attached to and made a part of the original petition as Exhibit "A", was mailed to petitioners on March 11, 1935.

(24) The alleged deficiency in tax as set forth in the deficiency notice aforesaid was due to the disallowance by the Commissioner as a deduction from gross income, in the determination of net income,

of the sum of \$12,000.00, paid during said year to said Alice Pauline Young MacRae and Nelson Gillette Young under the provisions of the Will of Maude G. Young.

E. R. CAMERON

Counsel for Petitioner.

(Sgd.) HERMAN OLIPHANT

General Counsel for the Department of the Treasury, Counsel for Respondent. [20]

KNOW ALL MEN BY THESE PRESENTS:

That I, MAUDE GILLET YOUNG, widow, of Honolulu, Territory of Hawaii, being of sound mind and memory, do hereby make, publish and declare this my last Will and Testament, hereby revoking all other wills and codicils by me heretofore made:

FIRST: I direct my Executors to pay all my just debts and funeral and administration expenses and also all estate, inheritance, succession and transfer taxes on all devises and bequests given hereby and also the cash legacies given hereby, out of the cash principal of my estate at the time of my death and the proceeds of sales of my bonds and real estate and the surplus net income over the amount payable to my daughter and son as hereinafter provided, without selling any of my corporation stocks. If my Executors shall not be able to complete all said payments out of cash derived from said sources within a reasonable time I authorize my Executors to complete the administration of

my estate and to transfer and deliver the residue of my property as hereinafter provided to my Trustees hereinafter named, charged with the payment of said cash legacies, and I authorize my said Trustees to accept said residue so charged with said cash legacies and to pay the same out of the surplus net income of my trust estate. The said cash legacies shall be paid in such order as my Executors or Trustees shall determine in their sole discretion. The three cash legacies of Fifteen Thousand Dollars (\$15,000.) each to my three sisters shall bear interest at the rate of six per cent (6%) per annum from my death until payment. [21].

SECOND: I give and bequeath all my clothing, jewelry and other personal goods and effects of whatever nature and all of my household furniture, goods and effects of every nature either of use or ornament and my automobiles to my children who shall survive me, in equal shares if more than one.

THIRD: I give and bequeath the sum of Fifteen Thousand Dollars (\$15,000.) to LEAHI HOME, a Hawaiian corporation, in memory of my late husband, Archibald Alfred Young, to be used, if possible, in connection with the Young Memorial in that institution.

FOURTH: I give and bequeath the sum of Ten Thousand Dollars (\$10,000.) to THE PROTESTANT EPISCOPAL CHURCH IN THE HAWAIIAN ISLANDS, a Hawaiian corporation, in memory of my late son, Archibald Alfred Young, Jr., in trust for the Cathedral Parish of St. Andrew.

at Honolulu, all the net income derived from said trust fund to be used and applied in the discretion of the rector of said parish or if there shall be no rector or in his absence or disability, in the discretion of a priest designated by the Bishop of the Missionary District or Diocese, to help boys and young men in sickness or other trouble.

FIFTH: I give and bequeath the sum of Fifteen Thousand Dollars (\$15,000.) to my sister, CHARLOTTE GILLET.

SIXTH: I give and bequeath the sum of Fifteen Thousand Dollars (\$15,000.) to my sister, ALICE GILLET BERG.

SEVENTH: I give and bequeath the sum of Fifteen Thousand Dollars (\$15,000.) to my sister, FRANCES GILLET. [22]

EIGHTH: I give and bequeath the sum of Ten Thousand Dollars (\$10,000.) to those of my three sisters above named who shall survive me, to be distributed to such charitable organizations or to assist such person or persons as they shall select.

NINTH: I give, devise and bequeath all of the rest, residue and remainder of my property, both real and personal, wherever situated and of whatever nature, to BISHOP TRUST COMPANY, LIMITED, a Hawaiian corporation, and ARTHUR BERG of Honolulu, Territory of Hawaii, as Trustees to have and to hold the same to them and their successors in trust upon the following trusts:

(a) To pay to my daughter, Alice Pauline Young MacRae, wife of Herbert Bennett MacRae,

the sum of Five Hundred Dollars (\$500.) each and every month in advance on the first day of the month, beginning as of the date of my death and making the first payment as soon as possible after my death, until she and my son, Nelson Gillet Young, shall both have attained the age of thirty-five (35) years or died;

(b) To pay to my son, Nelson Gillet Young, the sum of Two Hundred Fifty Dollars (\$250.) each and every month in advance on the first day of the month, beginning as of the date of my death and making the first payment as soon as possible after my death, until he shall attain the age of twenty-five (25) years or until his marriage or death, whichever event shall happen first, and thereafter to pay to him, if surviving, the sum of Five Hundred Dollars (\$500.) each and every month in advance on the first day of the month until he and my daughter, Alice Pauline Young MacRae, shall both have attained the age of thirty-five (35) years or died.

[23] (c) When my daughter, Alice Pauline Young MacRae, and my son, Nelson Gillet Young, shall both have attained the age of thirty-five (35) years or died, to transfer, convey and deliver in fee simple, free from any trust, one-half ($1/2$) of all the principal and accumulated income of the trust estate to my said daughter if she shall be then surviving or if she shall not be then surviving, to her issue then surviving or if there shall be none of her issue then surviving to my said son if he shall be then surviving, or if he shall not be then surviv-

ing to his issue then surviving, and one-half ($\frac{1}{2}$) of all the principal and accumulated income of the said trust estate to my said son if he shall be then surviving and if he shall not be then surviving to his issue then surviving or if there shall be none of his issue then surviving, to my said daughter if she shall be then surviving or if she shall not be then surviving to her issue then surviving;

(d) If my said daughter shall die before my said son leaving issue surviving her then my Trustees shall pay said issue all the income which she would have been entitled to receive if she had continued to survive until the death of my son and at the same times and under the same conditions. If she shall die before my son without leaving issue surviving her or if she shall die before my son leaving issue surviving her but said issue shall all die before the death of my son, my Trustees shall thereafter pay to my son all the income which my daughter would have been entitled to receive if she had continued to survive until his death and at the same time and under the same conditions;

(e) If my said son shall die before my said daughter [24] leaving issue surviving him then my Trustees shall pay said issue all the income which he would have been entitled to receive if he had continued to survive until the death of my daughter and at the same times and under the same conditions. If he shall die before my daughter without leaving issue surviving him or if he shall die before my daughter leaving issue surviving him but said

issue shall all die before the death of my daughter, my Trustees shall thereafter pay to my daughter all the income which my son would have been entitled to receive if he had continued to survive until her death and at the same times and under the same conditions;

(f) I hereby authorize my Trustees to pay to my daughter or son or to use and apply for her or his benefit prior to the distribution of the principal, portions of the income or accumulated income derived from the trust estate in addition to the amounts hereinabove set forth if and whenever in their discretion such additional income shall be needed by her or him because of illness or for any other special cause or purpose. All surplus net income shall be accumulated and become a part of the principal of said trust estate provided that it may thereafter from time to time be paid by my Trustees to or for the benefit of my daughter and son as set forth in the preceding part of this sub-paragraph:

(g) If my daughter and son shall both die prior to the distribution of the principal of my trust estate and if there shall be no issue of my children then surviving, to transfer, convey and deliver all of the principal and accumulated income of said trust estate in fee simple, free from any trust as follows: [25]

Three-fourths ($3/4$) to those who would have been the heirs of my late husband, Archibald Alfred Young, if he had then died intestate and domiciled in the Territory of Hawaii and in the same propor-

tions, and one-fourth (1/4) to those who would have been my heirs if I had then died intestate and domiciled in the Territory of Hawaii and in the same proportions;

(h) None of the beneficiaries of my said trust estate shall have the right or power in any way to anticipate, alienate or assign his or her interest in the income or the principal of my said trust estate or to use his or her interest in the said income or principal as collateral security for a loan or pledge or mortgage the same in any manner, and I direct my Trustees not to recognize or give any force or effect to any such anticipation, alienation, assignment, pledge or mortgage; and I direct my Trustees to make payment directly to the said beneficiaries, free from the control of any husband or wife and free from the interference or control of the creditors of any beneficiary;

(i) My said Trustees shall have the power to sell at public or private sale, lease for terms not exceeding thirty (30) years, which leases shall be valid throughout their terms notwithstanding the prior termination of the trust, convert, mortgage, hypothecate and otherwise deal in any manner with all real estate and personal property forming the principal of said trust estate, with full powers with reference to the management thereof, and to invest the proceeds thereof, with like power of sale, disposition and investment from time to time in the discretion of said Trustees, and to execute and deliver all deeds, [26] leases and other instruments

necessary or appropriate to pass a proper title thereto and to perform said powers and to carry out said purposes, and no person or corporation buying from or dealing with said Trustees shall be under any obligation to see to the reasons or authority for any action taken by said Trustees; and shall consider, hold and treat all stock dividends received by them, being dividends in the form of capital stock issued by corporations, shares of the capital stock of which form part of said trust estate, as principal and not as income of said trust estate, and shall consider and treat all income received from my Executors as income and not as principal of said trust estate, and shall have full power of determining the proportion and mode in which special assessments and taxes for street improvement and other special purposes shall be borne as between capital and income, and every such determination shall be conclusive on all parties interested; and shall pay the net income derived from said trust estate either quarterly or monthly as shall seem advisable in their discretion except as hereinabove specifically provided, and shall have authority in their discretion to pro rate during the year and withhold from said payments of net income and pay proportionate shares of the taxes, commissions of Trustees, interest and other special expenses of said trust estate so that said payments of net income may be more regular and even in

amount; the gross income of bonds belonging to the trust estate shall be the contract rate of interest expressed in the bonds respectively without deduction for premiums if the bonds are purchased above par or for losses if they are sold or otherwise disposed of below the purchase price and without addition for discounts if the bonds are purchased below par or for gains if they are sold or otherwise disposed of above the purchase price; [27]

TENTH: I nominate and appoint said BISHOP TRUST COMPANY, LIMITED, and said ARTHUR BERG, as Executors of this my last Will and direct that no bond shall be required from them as said Executors or as said Trustees.

ELEVENTH: In the event that said Arthur Berg shall at any time or times fail or cease to act as such Executor or Trustee, whether by reason of death, resignation, refusal, removal, incapacity or otherwise, I authorize, empower and direct said Bishop Trust Company, Limited, by written instrument filed in the probate and/or equity court as the case may be, and with the written approval of my two children or the survivor of them, to appoint a successor co-executor and/or co-trustee who shall thereupon become vested with all the rights and powers and subject to all the duties and responsibilities of an original co-executor and/or co-trustee hereunder, and who need not file any bond in said capacity.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 24th day of September, 1926.

[Seal]

MAUDE GILLET YOUNG
M. F. PROM

Honolulu, Hawaii

ROBBINS B. ANDERSON,

Honolulu, Hawaii

BENJ. L. MARX

Honolulu, Hawaii

Signed, sealed, published and declared by the said MAUDE GILLET YOUNG, as and for her last Will and Testament in the presence of us being present at the same time, who, at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses thereto this 24th day of September, 1926.

[Endorsed]: Filed at hearing Jan. 13, 1936. [28]

[Title of Court and Cause.]

E. R. CAMERON, C.P.A. for the petitioner
JAMES H. YEATMAN, Esq., for the respondent

MEMORANDUM OPINION.

ARNOLD: This proceeding involves a deficiency in income tax asserted by the respondent for the year 1932 in the amount of \$712.51. The only issue presented is whether the sum of \$12,000 paid by petitioner in 1932 to the beneficiaries of a trust consti-

tuted an allowable deduction from the gross income of the trust for such year. The facts are stipulated as follows:

The petitioners are duly appointed and qualified Trustees of the Maude G. Young Trust, created under the Will of Maude Gillett Young, deceased, with their principal office in the offices of the Bishop Trust Company, Limited, King and Bishop Streets, Honolulu, T. H. [29]

Maude Gillett Young, widow, died testate on October 3, 1926, a resident of Honolulu, Territory of Hawaii, and was survived by two children, Alice Pauline Young MacRae and Nelson Gillett Young.

The testatrix died seized of an estate both real and personal, the disposition of which she provided for in her last Will and Testament, executed on September 24, 1926.

Exhibit "A" attached hereto is a photostat copy of the Will aforesaid, and is hereby made a part hereof to the same effect as if set forth herein in full.

The aforesaid Will was duly admitted to probate in the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

Letters testamentary issued on November 15, 1926, to Bishop Trust Company, Limited, and Arthur Berg, aforesaid, as Executors, who duly entered upon their duties as such.

The Executors and Trustees named in the Will aforesaid, being the same parties, assumed to function concurrently in the management and control of the estate and the trust.

On December 20, 1926, said Executors petitioned to be, and in fact were, appointed Trustees under the Will of the Maude G. Young Trust Estate.

Said appointment, in part, was to facilitate the payment of the monthly sums to the daughter and to the son, as called for by Will, from the date of death, inasmuch as the Will provided that such payments should be made by the Trustees as distinguished from the Executors. [30]

Subsequent to the death of Mr. Arthur Berg, on June 1, 1934, a co-Trustee as aforesaid, the surviving Trustee, pursuant to the provisions of Clause XI of said Will, appointed Nelson Gillett Young as successor Co-Trustee.

The aforesaid appointment was approved and confirmed by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at Chambers in Equity, under Vesting Order dated November 22, 1934.

On February 17, 1928, the Executors petitioned for the allowance of their first and final accounts, determining trust and final distribution, covering a period from October 5, 1936, to January 19, 1928.

Said accounts were approved and Order of Discharge of the Executors made on April 16, 1928, whereby said Executors were ordered to deliver to the Trustees in final distribution the residuary estate subject to the payment of the cash legacies.

Receipt therefor was filed on May 17, 1928, by the Trustees as residuary legatees and devisees, and the Clerk's Certificate of Final Discharge issued on June 13, 1928.

The Trustees recorded on their books, as follows, the residuary estate, amounting to \$820,780.61, subject to unpaid cash legacies, as aforesaid, totaling \$80,000.00:

King and Victoria Streets property	\$75,000.00
Pacific Heights Lot #9	4,382.64
Leasehold Papaakoko	8,000.00
von Hamm-Young Company, Limited	281,500.00
Bishop Trust Company, Limited	3,925.00
Alexander Young Estate	296,200.00

[31]

McCabe, Hamilton & Renny	450.00
Waialua Agricultural Company	10,575.00
Stamps, Miscellaneous Collection	5,000.00
Cash, Bank of Bishop & Company, Ltd.	15,217.97
Estate	\$10,042.87
Maude G. Young Trust	5,175.10

Kaialua Land Trust	530.00
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Capital		\$620,780.61
Legacies:		80,000.00
Leahi Home	15,000.00	
The Protestant		
Episcopal Church	10,000.00	
Miss Charlotte Gillett	15,000.00	
Mrs. Alice Gillett Berg	15,000.00	
Miss Frances Gillett	15,000.00	
Charitable purposes	10,000.00	
		\$700,780.61 \$700,780.61

Pursuant to the terms of the Will of Testatrix, the Trustees have made monthly payments of the sums specified therein to her children from the date of death, October 3, 1926, to the present time.

The books of account and records of the Trustees have been kept on the cash-receipts and disbursements basis at all times; and their Federal income tax returns have been filed on the same basis.

The accounts of the Trustees have been kept upon the basis of a fiscal year ending on a day other than the last day of the month.

During the calendar year 1932, the statutory income and deductions (not including whatever deduction may be allowable under the provisions of Section 162 (b) of the Revenue Act of 1932 on account of payments made to beneficiaries) of the Maude G. Young Trust were, of amount, as follows: [32]

Gross Income

Interest	\$ 784.80	
Rent	1,631.42	
Dividends (domestic)	25,263.02	\$27,679.24

Deductions

Taxes	\$ 1,443.76	
Other deductions	1,885.29	3,329.05

Net income prior to the
application of Section
162 (b)

\$24,350.19

Nelson Gillett Young was both twenty-one years of age and married prior to the beginning of the calendar year 1932; but neither Nelson Gillett Young nor Alice Pauline Young MacRae had attained the age of thirty-five years on or before December 31, 1931.

In accordance with the Will of the testatrix, the Trustees made distributions to the aforesaid cestuis que trust during the calendar year 1932 as follows:

Alice Pauline Young MacRae	\$6,000.00*
Nelson Gillett Young	6,000.00*

*12 monthly payments of
\$500.00 each.

The Trustees, in their return of annual net income, on Form 1041, for said calendar year, which return was filed with the Collector of Internal Revenue for the District of Hawaii, at Honolulu, Hawaii, claimed an additional deduction, under the provisions of Section 162 (b) of the Revenue Act of 1932, of the \$12,000.00 distributed to the cestuis as aforesaid, and voluntarily paid the Collector of Internal Revenue at Honolulu \$102.51 income tax on the undistributed net income of the Trust.

The Commissioner of Internal Revenue examined the income tax [33] return of the Maude G. Young Trust for the calendar year 1932, and a notice of deficiency, a copy of which is attached to and made a part of the original petition as Exhibit "A", was mailed to the petitioners on March 11, 1935.

The alleged deficiency in tax as set forth in the deficiency notice aforesaid was due to the disallowance by the Commissioner as a deduction from gross income, in the determination of net income, of the sum of \$12,000.00, paid during said year to said Alice Pauline Young MacRae and Nelson Gillett Young under the provisions of the Will of Maude G. Young.

The solution of this issue depends on the construction of the Will of Maude Gillett Young. The petitioner relies on *Helvering v. Butterworth*, 290 U. S. 365 and contends that under Section 162 (b) of the Revenue Act of 1932, it should be allowed as an additional deduction in computing its net income for the taxable year the sum of \$12,000 paid to Alice Pauline Young MacRae and Nelson Gillett Young in 1932. It urges that, although sections (a) and (b) of the ninth paragraph of the will make no provisions for the payment of the sums therein specified from income, a construction of the will as a whole leads to the conclusion that such was the intention of the testatrix.

The respondent contends that under the provisions of the will the payments to Alice Pauline Young MacRae and Nelson Gillett Young are to be made by the trustees at any event and, under the authority of *Helvering v. Pardee* 290 U. S. 365 and *Burnett v. Whitehouse* 283 U. S. 148, are not deductible in computing the net income of the estate or trust. [34]

Sections (a) and (b) of the ninth paragraph of the will are as follows:

To pay my daughter, Alice Pauline Young MacRae, wife of Herbert Bennett MacRae, the sum of Five Hundred Dollars (\$500) each and every month in advance on the first day of the month, beginning as of the date of my death and making the first payment as soon as possible after my death, until she and my son.

Nelson Gillett Young, shall both have attained the age of thirty-five years (35) or died;

To pay my son, Nelson Gillett Young, the sum of Two Hundred Fifty Dollars (\$250) each and every month in advance on the first day of the month, beginning as of the date of my death and making the first payment as soon as possible after my death, until he shall attain the age of twenty-five years (25) or until his marriage or death, whichever event shall happen first, and thereafter to pay to him, if surviving, the sum of Five Hundred Dollars (\$500) each and every month in advance on the first day of the month until he and my daughter, Alice Pauline Young MacRae, shall both have attained the age of thirty-five years (35) or died.

We think sections (a) and (b) of the will, as set out above, clearly direct the trustees to pay to the daughter and son mentioned therein, a sum certain in any event, and, upon consideration of the record before us, we conclude that the petitioner is not entitled to take as an additional deduction in the taxable year the sum of \$12,000 so paid out. *Helvering v. Pardee*, supra; *Burnett v. Whitehouse*, supra. We are unable to agree with petitioner's contention that construing the whole will the intention of the testatrix was to require all payments by the trustees to be made from income. In our opinion the case does not come within *Helvering v. Butterworth*, supra.

Decision will be entered for the respondent.

[Entered]: Aug. 11, 1936. [35]

United States Board of Tax Appeals
Washington

Docket No. 79845.

BISHOP TRUST COMPANY, et al, Trustees,
Maude G. Young,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the determination of the Board, as set forth in its Memorandum Opinion, entered August 11, 1936, it is

ORDERED and DECIDED: That there is a deficiency of \$712.51 for the year 1932.

[Seal] (Signed) WILLIAM W. ARNOLD,
Member.

[Entered]: Aug. 11, 1936. [36]

[Title of Court and Cause.]

ORDER

The petitioner filed its petition in the above entitled proceeding on May 27, 1935, and the Board entered its Memorandum Opinion therein August 11, 1936, and its final Order and Decision August 11, 1936. In both its Memorandum Opinion and final Order and Decision the above entitled pro-

ceeding was erroneously captioned "Bishop Trust Company, et al, Trustees, Maud G. Young, Petitioner v. Commissioner of Internal Revenue, Respondent, the correct caption being Bishop Trust Company, Ltd., and Mr. Arthur Berg, Trustees, Maude G. Young Trust, Petitioners, v. Commissioner of Internal Revenue, Respondent; the premises being considered, it is;

ORDERED AND DECIDED that the caption of the Memorandum Opinion and the Order and Decision above referred to be amended as follows: "Bishop Trust Company, Ltd., and Mr. Arthur Berg, Trustees, Maude G. Young Trust, Petitioners, v. Commissioner of Internal Revenue, Respondent"

Enter.

[Seal] (Signed) WILLIAM W. ARNOLD,
Member.

Dated at Washington, D. C., August 13, 1936.

[37]

[Title of Court and Cause.]

PETITION OF TAXPAYER FOR REVIEW BY
THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT
FROM A DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS.

Taxpayer, the Petitioners above named, by SMITH, WILD, BEEBE & CADES, of Honolulu, their Attorneys, hereby file their petition for a review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of the United

States Board of Tax Appeals rendered on August 11, 1936, determining a deficiency in the Petitioners' Federal income tax for the calendar year 1932 in the sum of \$712.51 and respectfully show:

I.

That your Petitioners are the duly appointed, qualified and acting trustees under the Will and of the estate of Maude G. Young, deceased, who died testate on October 3, 1926, a resident of Honolulu, in the Territory of Hawaii, whose Will dated September 24, 1926, was duly admitted to probate in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii on November 15, 1926. That her estate was duly administered by [38] her executors and thereafter on April 20, 1928 an order of distribution of her estate to the trustees, Petitioners, was made and her estate was so distributed to them. That following the institution of these proceedings in the above entitled court, one of the trustees of said Will, namely Arthur Berg, died on June 1, 1934, and thereafter on November 22, 1934, NELSON GILLETT YOUNG was duly appointed as successor co-trustee and said appointment was confirmed by the presiding judge at chambers in equity in the Circuit Court of the First Judicial Circuit, Territory of Hawaii, and said Nelson Gillett Young is now the duly appointed, qualified and acting successor co-trustee with the above named Bishop Trust Company, Limited, under the Will and of the estate of said testatrix.

II.

The controversy involves an assessment by the Respondent of a deficiency of income tax for the calendar year 1932 of \$712.51 against Petitioners, following the filing with the Collector in Honolulu aforesaid within the time prescribed by law of a Federal income tax return by your Petitioners, as fiduciaries under the Will and of the estate of the said Maude G. Young, deceased. The deficiency in income tax was assessed by reason of the disallowance by the Respondent of a deduction claimed by Petitioners under Section 162 (b) of the Revenue Act of 1932, from gross income for the year 1932 of \$12,000.00 paid in that year by the Petitioners under the terms of said Will to ALICE PAULINE YOUNG MacRAE and NELSON GILLETT YOUNG, the only surviving children of the testatrix, [39] beneficiaries named in her Will, a copy of which is in evidence.

By her Will, testatrix directed her executors to pay all her just debts and funeral and administration expenses and all estate and inheritance taxes on all devises and bequests out of the cash principal of her estate and the proceeds of sales of bonds and real estate and the surplus net income over the amount payable to her daughter and son as thereafter provided, without selling stocks. If her executors should not be able to complete all such payments, she authorized her trustees to accept the residue of her estate charged with cash legacies and to pay the same out of the surplus net income of

her trust estate. She bequeathed pecuniary legacies totalling \$80,000, and gave the residue of her estate which was valued at \$620,780.61 (after said legacies, debts and taxes had been provided for), and which was income producing to her trustees, in trust: to pay her daughter Alice Pauline Young MacRae \$500.00 monthly in advance from the date of death until she and testatrix's son should both have attained 35 years of age or died; to pay to her son, said Nelson Gillett Young, \$500.00 monthly (in the events which have happened) in advance until he and testatrix's daughter should both have attained 35 years of age or died; and thereafter to convey one-half of all the principal and accumulated income of the trust estate to her daughter and the same to her son absolutely; the Will provides that if either the daughter or the son should die before the other, leaving issue, the trustees should pay said [40] issue all the income which she or he would have been entitled to receive if she or he had lived, and in default of issue to pay all the income which the daughter or son would have been entitled to receive, if she or he had lived, to the other; the trustees were authorized to pay the daughter or son portions of the income or accumulated income in addition to the amounts above stated whenever in the trustees' discretion such additional income should be needed; that if the daughter and son should both die without issue prior to distribution of the principal to them, the principal and accumulated income should be conveyed to others. The

Will provides that none of the beneficiaries of the trust estate should have power to anticipate or alienate his or her interest in the income or principal of the estate.

Both the son and daughter were still living at the time of filing said tax return and neither of them have attained the age of 35. The son was over 25 years of age in the year 1935.

In the year 1932 the income from the trust estate after allowable deductions (but not including the deduction in controversy under Section 162 (b) of the Revenue Act of 1932) amounted to \$24,750.19. Out of this sum the trustees paid to each of the testatrix's children under the terms of her Will \$6,000.00, or a total of \$12,000.00, which latter sum was deducted in the trustees' income tax return from the income of \$24,750.19 above stated before net income for tax computation amounting to \$12,750.19 was determined. Income tax was paid on the net income admitted to be taxable, but [41] the Respondent disallowed the deduction of said \$12,000.00 and made the deficiency assessment above mentioned, contending that the sum of \$500.00 a month given by the testatrix to each of her children was an annuity payable in any event and was not a gift of part of the income only derived from the trust estate of the testatrix. Your Petitioners disagreed with the ruling of the Respondent and appealed to the United States Board of Tax Appeals, which filed its opinion and decision on August 11, 1936, affirming said deficiency assessment, and on the

same day filed an order specifying the amount of said deficiency of \$712.51.

The only question involved is whether there shall be allowed as a deduction, in computing the net income of the estate for tax computation for the year 1932, the sum of \$12,000.00, which, it is contended by the Petitioners, was distributed currently from income by the Petitioners to the beneficiaries as above stated.

III.

The Petitioners, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Board and by its decision entered pursuant thereto and the order assessing a deficiency of tax as aforesaid, desire to obtain a review thereof by the United States Circuit Court of Appeals for the Ninth Circuit.

IV.

ASSIGNMENTS OF ERROR

The Petitioners assign as error the following acts and omissions of the United States Board of Tax Appeals: [42]

(1) The failure to allow as a deduction from the Petitioners' gross income for the calendar year 1932 the sum of \$12,000.00 paid by the Petitioners to the testatrix's son and daughter as aforesaid;

(2) The failure to find that the sum of \$12,000.00 paid by the Petitioners to the testatrix's son and daughter as aforesaid in 1932 was paid entirely out of income of the said trust estate;

(3) The failure to find that the sum of \$500.00 a month payable to each of the testatrix's son and daughter under said Will was payable out of income only and that no part of said sum was payable out of principal of said trust estate;

(4) The failure to find that the sum of \$500.00 provided by said Will to be paid to testatrix's son and daughter each month was not payable in any event;

(5) The finding and holding that the said Will directed the trustees to pay to the daughter and son mentioned therein, a sum certain in any event;

(6) The finding and holding that petitioners are not entitled to take as an additional deduction in the taxable year the sum of \$12,000.00, so paid out as aforesaid.

(7) The finding and holding that construing said Will as a whole the intention of the testatrix was not to require all payments by the trustees to be made from income;

(8) The finding of a deficiency of \$712.51 for the [43] year 1932, in lieu of a determination that there is no additional income tax due from Petitioners for the year in controversy.

BISHOP TRUST COMPANY,
LIMITED

[Seal]

By C. F. DAMON

Its Vice-President

And E. BENNER, Jr.

Its Asst. Secy.

NELSON GILLETT YOUNG

Trustees under the Will and
of the Estate of MAUDE
G. YOUNG, Deceased, Pe-
titioners.

SMITH, WILD, BEEBE &
CADES

By HARRY EDMONDSON

Counsel for Petitioners

400 Bishop Trust Building
Honolulu, T. H.

Territory of Hawaii,
City and County of Honolulu—ss.

C. F. Damon, being first duly sworn, says that he is a Vice-President of BISHOP TRUST COMPANY, LIMITED, one of the trustees under the Will and of the Estate of MAUDE G. YOUNG, Deceased, Petitioners in the above entitled cause; that as such he is authorized to sign and verify the foregoing Petition for Review; that he has read the said Petition and is familiar with the statements contained therein; and that the statements made are true to the best of his knowledge, information and belief.

C. F. DAMON

Subscribed and sworn to before me this 2nd day
of November, 1936.

[Seal]

JOHN LITTLE

Notary Public, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Filed Nov. 9, 1936 [44]

[Title of Court and Cause.]

NOTICE OF FILING PETITION
FOR REVIEW.

To the Commissioner of Internal Revenue and to
General Counsel for the Bureau of Internal
Revenue, Counsel for the Respondent, Wash-
ington, D. C.:

PLEASE TAKE NOTICE that the Petitioners
on the 9th day of November, 1936, filed with the
Clerk of the United States Board of Tax Appeals
at Washington, D. C., a petition for review by the
United States Circuit Court of Appeals for the
Ninth Circuit of the decision of the Board hereto-
fore on, to-wit, August 11, 1936, rendered in the
above-entitled cause. A copy of the petition for
review and the assignments of error as filed is
hereto attached and served upon you.

Dated at Washington, D. C., this 9th day of No-
vember, 1936.

Respectfully,
SMITH, WILD, BEEBE &
CADES

By HARRY EDMONDSON

Counsel for Petitioners
400 Bishop Trust Building
Honolulu, T. H. [45]

Personal service of the foregoing notice, together
with a copy of the petition for review and assign-

ments of error mentioned therein, is hereby acknowledged this 9th day of November, 1936.

HERMAN OLIPHANT

General Counsel, Dept. of the
Treasury, Counsel for Re-
spondent.

[Endorsed]: Filed Nov. 9, 1936. [46]

[Title of Court and Cause.]

PRAECIPE.

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare and duly certify as correct and forward to the Clerk of United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the following documents in the above entitled cause:

(1) The Docket Entries of proceedings before the Board;

(2) Pleadings before the Board including

(a) Petition filed May 27, 1935;

(b) Answer filed July 26, 1935; and

(c) Stipulation of facts, with copy of Will of Maude G. Young, deceased, attached, as "Exhibit A" thereto, filed January 13, 1936.

(3) Opinion and decision of the Board; Order of a deficiency filed August 11, 1936; and Order amending caption filed August 13, 1936;

(4) Petition for Review, and Notice of Filing
Petition for Review; [47]

(5) This praecipe.

Dated: December 23, 1936.

(s) FRANK F. NESBIT

Metropolitan Bank Building,
Washington, D. C.

Counsel for Petitioners.

Service of a copy of the foregoing is hereby acknowledged this 23rd day of December, 1936. No Counter Praecipe will be filed.

MORRISON SHAFROTH

Assistant General Counsel for
the Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: Filed Dec. 23, 1936. [48]

[Title of Court and Cause.]

CERTIFICATE.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 48, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praeceptum in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 28th day of December, 1936.

[Seal]

B. D. GAMBLE

Clerk, United States,
Board of Tax Appeals.

[Endorsed]: No. 8431. United States Circuit Court of Appeals for the Ninth Circuit. Bishop Trust Company, Limited, and Mr. Arthur Berg, Trustees, Maude G. Young Trust, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed January 4, 1937.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

